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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
Review of the Policy Implications ) MM Docket No. 91-221  
of the Changing Video Marketplace )

Comments of the Television Operators Caucus, Inc.

James C. Dowdle  
Chairman, Board of Directors  
Television Operators Caucus, Inc.

Mary Jo Manning  
Coordinator  
Television Operators Caucus, Inc.  
901 31st Street N.W.  
Washington, D.C. 20007-3838  
202/944-5109

November 21, 1991

**SUMMARY**

The Commission is to be commended for initiating this proceeding. The video landscape has significantly and permanently changed during the past decade, accelerating in the past five years, and it will continue to change at a rapid pace, requiring continuing review. The time is ripe for a wholesale reexamination of the Commission's broadcast station rules with a view toward elimination and modification of those rules which are based upon the now obsolete finding that television broadcast is the primary distribution vehicle into the American television household.

The broadcast industry is not in "critical condition," but it must be permitted to respond in the multichannel marketplace to its competitors, notably the cable industry. Competitive responses will vary from station to station and from market to market, but in all cases no adequate response can be mounted under the current rules.

The rule changes which are required will not, and should not be allowed to, undermine the public interest principle of the 1934 Communications Act. Indeed, timely change will enhance and preserve this important goal and will ensure that some free television service will be available and attractive to the entire public, not merely those who cannot afford to pay for other video services.

The Commission must move expeditiously to begin formal

rulemaking proceedings. Rule modification is critically needed to allow stations to develop new programming sources, to maximize the use of existing facilities and to experiment with new technologies. Broadcasters must be able to test the viability of regional station operations, joint ventures, program and advertising cooperatives and scale economies between and among broadcast stations. In addition, the Commission must continue to advocate changes to the Communications Act or other relief so that broadcasters may control the use of broadcast signals by their competitors. Further, as the FCC recognized with respect to OCCs in the common carrier context, broadcasters must not be denied reasonable, multichannel access to the television viewer.

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Comments

Television Operators Caucus, Inc.

In response to Notice of Inquiry FCC 91-215, MM Docket No. 91-221, adopted July 11, 1991 and released August 7, 1991, the Board of Directors of the Television Operators Caucus, Inc. hereby submits its comments.

The Board of Directors<sup>1</sup> of the Television Operators Caucus,

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<sup>1</sup>Current Board Members:

James C. Dowdle, President, Tribune Broadcasting Company  
(and Chairman of the Caucus).

George E. Castrucci, President and CEO, Great American  
Communications.

John G. Conomikes, Vice President and General Manager,  
Broadcasting, The Hearst Corporation (and Secretary-Treasurer of  
the Caucus).

George N. Gillett, Jr., President, Gillett Holdings, Inc.  
Ward L. Huey, Vice Chairman of the Board and President,  
Broadcast Division, A.H. Belo Corporation.

Edward T. Reilly, Jr., President, McGraw-Hill Broadcasting.  
G. William Ryan, President and CEO, Post-Newsweek Stations.  
Burton B. Staniar, Chairman and CEO, Westinghouse  
Broadcasting.

Nicholas D. Trigony, President, Cox Broadcasting.

Cecil L. Walker, President and CEO, Gannett Broadcasting

Inc., ("Caucus") consists of twelve television broadcast group operators which own 65 affiliated and independent television stations in markets serving over 52 million households. Created in 1985, the Caucus was organized to consider, and where appropriate to present its views on, issues of concern to television station operators. The Board believes that the instant proceeding raises issues which are fundamental to its station operations and bear on the continued ability of free television to meet the needs and interests of the viewing public.<sup>2</sup>

**I. THE TIME HAS COME FOR A MODIFIED REGULATORY REGIME FOR TELEVISION BROADCASTING BASED UPON THE MULTIPLICITY OF VIDEO ALTERNATIVES CURRENTLY IN THE MARKETPLACE.**

The Commission is to be commended for initiating this proceeding. The video environment has changed radically since the Commission adopted the broadcast station rules. The Commission's expressed "concern that some of our television rules and policies may no longer be in step with current industry circumstances"<sup>3</sup> is well founded. The current state of the video

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(and Vice-Chairman of the Caucus).

Dudley Taft, President, Taft Broadcasting Company.

Joel Chaseman, Chaseman Enterprises (and Board Emeritus).

<sup>2</sup>The views expressed in this filing reflect the general consensus of the Board. Some members may not support all positions taken herein, while several Caucus members have filed individual comments in the instant proceeding to amplify their views.

<sup>3</sup>Notice of Inquiry, FCC 91-215, MM Docket No. 91-221, released August 7, 1991 at p.1 ("Notice").

market has fundamentally and permanently altered the premises upon which these rules and policies were based. Hence, the rules are no longer viable and do not further the public's interest in a free, universally available television service, able to meet the public's needs and interests.

The recent Office of Plans and Policy Working Paper<sup>4</sup> provides a thorough analysis of the video industry market today as well as likely future trends. This report and the comments the Commission will compile in the instant proceeding can lead the Commission to only one, inevitable conclusion: The time has come for a substantially modified approach to broadcast regulation.

The market changes to date as well as the trends suggested thereby do not mean the demise of the broadcast industry. But they do compel the alteration of out-of-date rules which no longer serve a public purpose and which actually work to disadvantage broadcasters and ultimately the public and its expectation of free, quality broadcast service with a rich array of sports, news and entertainment programming.

When the current rules were adopted and until the 1970's, the broadcast television industry provided the primary home video options for the vast majority of American households, while the number of local stations in operation was limited as well. As a result, an average viewer in 1976 had access to fewer than 6

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<sup>4</sup>Office of Plans and Policy Working Paper #26, Broadcast Television in a Multichannel Marketplace, DA 91-817, 6FCCRC3994 (1991) ("OPP Paper").

video channels<sup>5</sup>. Today that viewer has over 30 choices<sup>6</sup>. In addition to the major expansion of cable service (over 90% of television households are now passed by cable), the interim has seen the doubling of local stations, the introduction of wireless cable, SMATV and satellite dishes, and VCR penetration into 2/3 of viewing households<sup>7</sup>. Many markets offer over 60 channel choices, and it is only a matter of time before 100 channels will be the norm. With the median household receiving only 10 television stations, it is obvious that most of the past increase in video channels is attributable to non-broadcast video services, predominantly cable service. Future channel increases will come almost exclusively from these non-broadcast competitors.

Broadcast rules need not "protect" broadcasters from this changed and changing world, but these rules must not prevent broadcasters from adapting their operations to effectively compete in this new marketplace. As Chairman Markey recently challenged: "Broadcaster's ability to survive in [the new video] marketplace will turn on how well [broadcasters] adapt to impending competition and new technologies."<sup>8</sup> Broadcasters must adapt and with the Commission's and the Congress'

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<sup>5</sup>OPP Paper p. 13.

<sup>6</sup>Id. at 13.

<sup>7</sup>Id. at 11, 12, 70.

<sup>8</sup>Statement by Edward J. Markey, Chairman, House Telecommunications and Finance Subcommittee, before the Association of Maximum Service Television (MSTV), November 7, 1991 at page 10, ("Markey Speech").



expeditious actions, adapt they will.

At the present time Commission rules impede broadcasters by creating a significant asymmetry between the operational choices open to broadcasters and those open to their competitors. At the same time, the public no longer needs to affect broadcast conduct as it once did because competition can serve the same policy goals--and more effectively.

Given the differences among broadcast operations, including such factors as market share and size, affiliation, ownership and economic condition, broadcaster responses to current market situations are likely to vary. However, a modified regulatory (and statutory) regime at a minimum must provide the opportunity for television station operators to:

1. control the use of the broadcast signal by their non-broadcast competitors;
2. own stations in different communities within one region even if the Grade B contours overlap;
3. cooperate with other stations in the same market to present multiple channels of communication, programming and advertising ventures;
4. exceed the current station ownership limit relating to the number of station licenses under common control; and
5. have reasonable, multichannel access to the viewing public.

A modified regulatory regime must not encourage unhealthy trafficking in station properties. Therefore, the Commission may

wish to consider the effect of reimposing its anti-trafficking rule.

The Commission's rules must maximize the opportunity for broadcasters to be effectively competitive with cable operations. Adoption of the above mentioned changes are an important step in giving broadcasters a reasonable opportunity to meet cable and other video competition. As the process proceeds and as we gain greater insights into the nature of the emerging multichannel environment, additional changes may well be needed.

**II. AS THE ONLY PROVIDERS OF FREE, UNIVERSALLY AVAILABLE TELEVISION SERVICE, BROADCASTERS REMAIN UNIQUELY ABLE TO SERVE THE PUBLIC. THIS PUBLIC SERVICE OBLIGATION WILL NOT BE COMPROMISED BY A MODIFIED REGULATORY REGIME.**

Since its creation in 1985, the Caucus has strongly supported retention of the public interest obligation embodied in the 1934 Communications Act. In 1987, the Caucus adopted a public interest policy statement, which provided in part that "broadcasters must continue to have a public interest responsibility to present programming responsive to the needs and interests of the viewing public...."<sup>9</sup> It makes good policy and good business sense to provide a service which responds to the interests of our viewers.

The Caucus believes that the Commission's approach to broadcast regulation can be changed without offending this policy goal or the basic elements the Commission has relied upon to

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<sup>9</sup>TOC Policy Statement, "Television Station Public Interest Responsibilities," adopted February 12, 1987.

implement and measure it: localism, diversity and nation-wide availability. However, the Commission must be guided by a CONTEMPORARY measure of these public interest elements, and is now able to look to competitive alternatives in the marketplace to replace a portion of its regulatory vigilance.

It should be axiomatic that the broadcast industry can best serve the public if it remains a healthy and robust business. "Information is the currency of a democracy, and preservation of free, over-the-air broadcasting is essential to ensuring that all Americans have access to information"<sup>10</sup>.

While the broadcast industry should not have its profitability artificially protected by Commission fiat, it cannot maintain nationwide service if it is unreasonably prevented from reaching that public. It cannot provide quality programming if its product can be used by its competitors to derive the very revenues used later to outbid broadcasters for the next program or sports event. It cannot compete in a market awash with video channels when it is limited to single channels scattered at random across the country, unable to work with others in its market or to maximize the use of its assets and facilities.

**LOCALISM:** National programming is not nearly sufficient to address all the interests and needs of our citizens. Recognizing this, the Commission chose to authorize broadcasting as a local medium, providing local outlets to respond to and reflect the

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<sup>10</sup>Markey Speech at 17.

great variation of cultures, nationalities, religions, political structures, ages and interests among our cities, towns and regions. These policies have been a success; broadcast television is an essential part of the media choices which are locally available to the public. Local stations have compiled a solid track record of responding to the entertainment, news and informational needs of their communities.

Market changes to date do not appear to have undermined this confluence of good business and good policy as an operating principle, but changes have hurt it as an economic strategy. None of the rule changes being proposed by the Caucus would change the ability of local stations to honor the public commitment, but they will make it more likely that broadcasters can respond effectively to their competitors, remain a viable enterprise and have resources to provide public service.

**DIVERSITY:** As we have recently been reminded by world events, a free society must ensure robust debate and the exchange of a variety of information and ideas. Diversity in the ownership of outlets for this exchange is an important element in guaranteeing this free speech right by preventing too many outlets to come under common control. When there were far fewer stations on average in any community and the broadcast stations were the principal video medium in that community, the Commission may have been justified in setting the current ownership rules and in only looking at the broadcast industry when doing so.

Today, there are over 30 channels of video communication within the average community and many more in our major markets. Most of these channels are under the control of a broadcast competitor, which almost always bundles its offerings to viewers and packages its advertising sales through a single, coordinated sales operation. The multichannel environment in which the video industry now operates is driven by a different set of operational and economic imperatives than existed when the current rules were adopted. The risk now is that the current rules have the opposite effect of undermining broadcast program diversity by weakening broadcasters' ability to offer a strong menu of programming options and to access viewers.

The key to maintaining diversity in a multimedia environment is to ensure that the Commission's rules do not prevent broadcasters from competing for programs, for coverage of special events and for other elements that allow broadcasters to retain their uniqueness, their differentiation from the competition.

The time has come for the Commission to modify its ownership limits in light of the multiplicity of video outlets that currently exists and the diversity that has resulted from this multiplicity. For stations to continue to provide a wide variety of programming, they must compete against cable MSOs which can maximize their programming investments through multiple channels and common ownership of cable systems reaching a substantially larger portion of the viewing public than broadcast groups now are allowed to reach. Cable systems can use the broadcast

signals--all or key parts of them--to attract the audience and then program their own material to lure the viewer away from the broadcast stations.

Expanded broadcast ownership limits and other changes must allow broadcasters to develop regional networks and to otherwise create the "critical mass" needed to make new programming sources economically feasible.

**NATIONWIDE AVAILABILITY:** The stated purpose of the 1934 Communications Act is to make broadcast service "available to all the people of the United States...." (47 USC 151) The Commission's scheme for allocating broadcast licenses throughout the country so that all viewers would have access to at least several stations was intended to further this policy goal.

While the goal has essentially been achieved, it should not be abandoned. In fact broadcast television is the only medium offering a service which has been available at no charge to all viewers in the community.

Given the current state of affairs, the Commission now must focus on whether access to this free television service is being reasonably maintained. As a practical matter, subscribers to cable service lose the means to independently receive over the air signals when their sets are connected to the cable. Anyone who has temporarily lost cable service can attest to this fact of life. At this time most cable systems carry a complement of local stations, but this carriage is at the sufferance of the cable operator--a markedly precarious situation, and it only

extends to the broadcast station signal.

Must carry proposals would require the carriage of these signals, but if that requirement is relevant in a multichannel environment, the Commission should consider whether it is sufficient.

The Caucus believes that the Commission should ensure that broadcasters have reasonable access to multiple channels, including determining the reasonableness of rates for these channels and providing for acceptable channel positions.

Especially given the rapid acceleration in cable channel capacity, the Caucus believes that cable systems should not be allowed to unreasonably deny additional cable channels to broadcasters who wish to lease these channels to reach the viewer. The Commission need only refer to its common carrier policies for apt examples of the competitive protections inherent in reasonable access obligations imposed on a competitor who has exclusive access to the customer.

### **III. THE COMPETITIVE RELATIONSHIP BETWEEN BROADCAST AND CABLE IS SERIOUSLY OUT OF BALANCE DUE IN LARGE PART TO THE ASYMMETRY OF REGULATIONS.**

The Commission's broadcast rules have no companion in the cable field. Cable systems have no vertical or horizontal ownership restrictions; they generally have no intra-medium competitor in their service area; they have no need to seek Commission or other approval before joining together to create and disseminate a new program service on one of their numerous

channels; they do not even need to obtain a broadcaster's consent before expropriating the broadcaster's signal, in whole or in part. These differences have nothing to do with technological advantage or market acumen. Rather they are the result of regulatory asymmetry, and happily for this reason they are within the power of the Commission to remedy, or in the case of the compulsory license to urge the Congress to remedy.

As the OPP Paper clearly set out, in addition to the cable industry's ability to expropriate the broadcaster's property and potentially to deny the broadcaster access to the cable system, for all or part of its signal, cable's chief advantage lies in its ability to program a multiplicity of channels and to package multiple channel advertising. To some extent, this creates scale economies in the creation and distribution of programs.

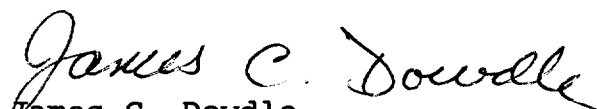
The Commission can, and should, modify the broadcast rules to allow stations to seek similar scale economies through such steps as increased station ownership, regional networks through ownership or alliances, and local program and advertising cooperatives.



**CONCLUSION**

The time has come for substantial modification of the broadcast station rules. The changes detailed herein will assist the broadcast industry to meet the changes which have occurred in the video market and in this way give broadcasters the ability they need--and should have--to shape the destiny of their business. The Commission must move quickly to begin the requisite rule making proceedings, especially in the area of duopoly, multiple ownership and reasonable access.

Respectfully Submitted,



James C. Dowdle  
Chairman, Board of Directors  
Television Operators Caucus, Inc.

Mary Jo Manning  
Coordinator  
Television Operators Caucus, Inc.  
901 31st Street N.W.  
Washington, D.C. 20007-3838  
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